

[2018] NZSSAA 57

Reference No. SSAA  
168/17

**IN THE MATTER** of the Social Security Act  
1964

**AND**

**IN THE MATTER** of an appeal by **XXXX** of  
XXXX against a decision  
of a Benefits Review  
Committee

## **BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**Mr G Pearson** - Chairperson

**Mr K Williams** - Member

**Mr C Joe** - Member

**Hearing** at Wellington on 26 September 2018

### **Appearances**

For appellant: Ms Homan (agent), with the appellant.

For Chief Executive of the Ministry of Social Development: Mr R Signal (agent)

## **DECISION**

### **Background**

[1] This appeal is unusual as it concerns historic events. We are concerned with a decision initially made in 2004 regarding recovery of overpayments of benefits, which had accrued during the period from 12 May 1997 to 25 January 2003.

[2] It is not necessary to discuss the reasons for the issues now coming before the Authority, it is sufficient to note they were considered by a

Benefits Review Committee, and this appeal followed promptly after that process.

- [3] The reason for the overpayments is that the appellant was in a relationship at the time, and any entitlement to benefit payments was at half the married rate. There is no dispute that the person with whom he was in a relationship (the appellant's former wife) was receiving benefit payments from outside New Zealand, and she failed to declare them. The result was overpaid benefit, and half was repaid by the appellant and half by the appellant's former wife.
- [4] It is important to recognise the appellant's personal situation. He had significant mental health issues at the time the events arose, and is still challenged by them. However, it is evident he has very successfully managed his condition to a level few people in a comparable situation can achieve. The essence of the appellant's explanation is that he was unaware his former wife was receiving a benefit from overseas. He only discovered that was the case after his relationship with her broke down, and he reported the overseas benefit to the Ministry. The plausibility of the explanation that the appellant knew nothing of the overseas benefit at the material time is appropriately weighed against the appellant's personal circumstances at the time. That is the primary relevance of his mental health. There is also an aspect of hardship in respect of repayment because of the fragility of the appellant's mental health.
- [5] The appellant accepts he was overpaid by the Ministry as his former wife's overseas benefit was not reported, and accordingly not taken into account by the Ministry. The basis for his appeal is that he neither knew, nor had reason to suspect, that he was not entitled to the payments. Further, that he relied on them, and in his particular circumstances it is unfair to require repayment.
- [6] The approach by the Ministry has been to test the appellant's evidence regarding the circumstances in which the overpayments arose. However, due to the passage of time, the Ministry has not been able to bring evidence beyond the appellant's account of the circumstances at the time (other than a transcript of an interview with his former wife when the Ministry investigated the issues).

- [7] Under the law as it was when the overpayments arose, the Ministry had a discretion to decide whether or not to recover the overpayments. The Authority's primary function is to make a factual evaluation of the appellant's claims, that he did not know overpayments were being made, and could not reasonably be held accountable for being unaware.
- [8] We must also assess the evidence given regarding the hardship of repayment, though the facts relating to that element were less contentious.
- [9] Having made those findings, we must then assess whether the overpayment should be recovered, applying the law as it was at the time of the disputed decision to recover the overpayment (2004).

### **The Legislation**

- [10] The legislation governing recovery was not contentious, there have been amendments to it since 2004.
- [11] The primary provision is s 86(1) of Social Security Act 1964 (the Act). The present form took effect from 7 July 2014 after amendment by the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014. We are concerned with the former s 86(1), which conferred a general discretion on the Chief Executive to decide whether to pursue recovery.
- [12] As was the case in 2004, s 86(9A) and (9B) prevent recovery of a debt which arises due to departmental error, in particular circumstances. In this case, there is no question of the debt being created due to an error on the part of the Ministry. The parties agree that the appellant's former wife failed to declare income, apparently dishonestly, and the Ministry had no part in that deception.
- [13] Accordingly, we are concerned with an historic debt, and the decision to recover it in 2004. We must apply the general discretion that then existed to decide whether the debt should be recovered.

## Discussion

### *Factual findings*

- [14] The Ministry was unsurprisingly concerned to make proper inquiries into whether the appellant was a party to the deception that led to the overpayment. Due to the passage of time, those inquiries were necessarily effective only to the extent of a careful cross-examination of the appellant's account.
- [15] The appellant and his former wife were married, lived in a home together and had children, including his former wife's three children from prior to their relationship. The appellant's account of the circumstances had the following key elements:
- [15.1] During the period from about 1997 to 2004, while the marriage subsisted, the appellant's former wife largely controlled the family finances.
- [15.2] The appellant was aware that the family received support from benefits, but the family was nonetheless comfortable financially.
- [15.3] The appellant understood that the reason for the family's financial position was that his former wife inherited a substantial sum of money, accordingly the family owned their own home with a modest mortgage.
- [15.4] The appellant suffered mental health issues, which lessened his level of contribution to, and interest in, some family matters, including financial issues.
- [15.5] The marriage broke down when his former wife commenced a new relationship, then the appellant left the family home. The appellant did not indicate there was an acrimonious relationship with his former wife before or after their relationship failed.
- [15.6] When he left the family home, the appellant sought professional assistance with his mental health, and relied on professional advice. When he visited the family home, he collected mail and on one occasion found correspondence regarding the overseas

benefit paid to his former wife. He says she had previously managed all mail received at the home, and this was the first time he became aware of the overseas benefit.

[15.7] The appellant said he was concerned about the income from overseas, as he appreciated it could affect benefit entitlements. Furthermore, the nature of the payments made it apparent that his former wife likely received the payments when he was living with her. Accordingly, he discussed what he had discovered with the mental health professional advising him, and she advised him to provide the information to the Ministry, which he did.

[15.8] Since that time, the appellant has successfully learned to manage his mental health, qualified for a trade, worked within the constraints of his mental health, and established a substantial degree of autonomy. He lives in an environment that assists him to manage his mental health. From 2004 to the present time, the appellant has found repaying the overpayments a burden, and it has detrimentally affected his mental health when he has been unable to successfully dissociate from thoughts concerning the liability.

[16] We found no inconsistency in the appellant's explanation. No elements of it were implausible. The explanations for the limited engagement with family finances during the marriage, and the family's relatively comfortable financial circumstances, were plausible. We have no basis to doubt the appellant believed there was an inheritance (or indeed that there was an inheritance), or that the appellant was willing to largely disengage from the family finances.

[17] We have carefully considered the plausibility of discovery of the overseas benefit only after separation. We cannot regard the explanation as inherently implausible, and it does derive significant support from the fact that the appellant did report the income to the Ministry. If he had been a party to the deception, it is not very likely he would have exposed himself to liability through voluntary disclosure at that point.

[18] We are left with an account from the appellant that is consistent and plausible. It does not clash with contemporaneous records. The only

competing evidence is an account given by the appellant's former wife. She claimed that the appellant was a party to the non-disclosure in an interview in 2004. She did not give evidence before the Authority, it appears she cannot be located. There is a difficulty with the statements the appellant's former wife made in 2004. She was being interviewed about a fraud she apparently perpetrated on the Ministry. The tenor of the interview was to claim lack of knowledge of the significance of the overseas benefit, and place responsibility on others, including the appellant. However, she also claimed another former partner provided false information to the Ministry.

[19] In the absence of the opportunity to cross-examine the appellant's former wife, we can place little weight on what she said to exculpate herself from what appeared to be a potential fraud. She was in a particularly difficult situation at the time of the interview. She said that prior to her relationship with the appellant, a former partner provided false information to the Ministry and a \$37,000 debt was established as a result. It appears she ought to have been aware of her reporting obligations, and there can be no doubt the overseas benefit was her own personal income. We cannot justify discounting the appellant's sworn evidence that was subject to cross-examination, relying on what his former wife said in these circumstances.

[20] Accordingly, we accept the appellant's evidence and conclude:

[20.1] He was not aware of the income his former wife received at the time.

[20.2] He received the overpayments in good faith.

[20.3] He altered his position by allowing his former wife to expend the money on family needs, believing the money was provided for that purpose.

[20.4] The appellant, due to his fragile circumstances, has not been well placed to repay the overpayment, and the obligation to do so has made it more difficult for him to maintain wellness and financial independence.

*Exercise of the discretion*

[21] Given our factual determinations, we are satisfied that this is a case where the overpayments should not be recovered, and that was the correct decision to make in 2004. Significantly, we note that none of the factors in themselves would necessarily result in a favourable exercise of the discretion. We have had regard to the full range of circumstances, and we are satisfied recovery of any of the overpayments would be inequitable when exercising the relatively open discretion in s 86 as it was in 2004.

**Decision**

[22] The appeal is allowed. The decision to seek recovery of \$31,762.69 relating to the overpayment of payments made under the Act is wrong, and should be reversed. The debt will not be recovered.

**Observation**

[23] The present case is unusual, it has been decided some 14 years after the key events. The Ministry's ability to explore the facts has been limited. Appropriately, the Ministry explored the veracity of the appellant's evidence through cross-examination. We express our appreciation for the sensitive and thorough way in which Mr Signal pursued those matters.

**Dated at Wellington** this 31<sup>st</sup> day of October 2018

**G Pearson**  
Chairperson

**K Williams**  
Member

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**C Joe JP**  
Member